THE TREATY-MAKING POWER.

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MR. GLADSTONE said, of the Constitution of the United States: "It is the most wonderful work ever struck off in a given time, by the brain and purpose of man." It is the foundation of the Republic, the enduring ledge which grips, forever, the anchor of our Ship of State. The difficulty of changing it is so great that it is almost immutable. Immediately after it went into effect ten amendments were adopted, and in the hundred and sixteen years that have followed, but five more have been found necessary; three through the abolition of slavery. Though framed for only six million pioneers, in the wilderness, it has stood the tests of time and the expansions of more than a century, and is to-day for eighty millions of people and the dominant nation of the earth as firm a foundation and safe an anchorage as it was for their forefathers.

Few important questions remain unsettled concerning the scope and intention of the Articles of the Constitution. Among them the most interesting concerns the treaty-making power. Even before its adoption, the able statesmen who framed the clause had widely differing opinions concerning its scope, and from 1796 to the present day the same diversity has caused long and heated debates in both branches of Congress.

When the President made and submitted to the Senate the treaty with Cuba, providing for the admission into this country of Cuban products, at reduced rates of duty, in contravention to the Dingley tariff, in return for like concessions from Cuba, upon our products, the treaty was duly ratified by the Senate, by more than a two-thirds vote, but it contained a provision that it should not take effect until approved by the Congress. The discussion

which arose was over the bill approving it, and the wide difference of opinion which still exists was shown in the three distinct positions which were supported, in debate, by the most learned and able lawyers in the Senate:

First, that reciprocity treaties could not constitutionally be made and ratified by the President and the Senate, even though Congress may subsequently pass a law to carry such treaties into effect, or may repeal the tariff laws with which they conflict;

Second, that reciprocity treaties *can* constitutionally be made by the President, ratified by the Senate, but that Congress must pass a law carrying all such treaties into effect;

Third, that the President and Senate have the power to make and ratify reciprocity treaties, and that they immediately become the supreme law of the land, repealing any law with which they may conflict; that, where the treaty does not itself provide for Congressional action, it becomes fully effective upon ratification by the Senate.

The Constitution says that the President shall have power, with and by the advice and consent of the Senate, to make treaties. At least, we shall all admit that the President does not derive his treaty-making power from Congress, and that no law of Congress can in any way modify or limit that power, and that, in the Constitution, Congress, as a legislative body, is not, in any way, a part of the treaty-making power.

Justice Field said upon this question:

"The treaty-making power, as expressed in the Constitution, is in terms unlimited except by those restrictions which are found in that instrument against the action of the Government or of its departments, and those arising from the nature of the Government itself, and that of the States. It would not be contended that it extends so far as to authorize that which the Constitution forbids, or a change in the character of the Government, or in that of one of the States, or a cession of any portion of the territory of the latter without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiations with a foreign nation."

Justice Story said:

"The power to make treaties is by the Constitution general, and of course it embraces all sorts of treaties, for peace or war, for commerce or territory, for alliance or succors, for indemnity for injuries or pay-

ment of debts, for recognition and enforcement of principles of public law, and for any other purpose which the policy or interests of independent sovereigns may dictate in their intercourse with each other."

The history of the treaty-making power is, in itself, suggestive of its intent. In the original Articles of Confederation, the power was given to Congress, only limited by the provision that no treaty should restrict the legislative power of the States to impose duties and prohibit commerce in any species of goods; and not the least of the defects which soon developed in the Articles was the defect in the treaty-making power. The result was the Constitutional Convention for the purpose of revising the Federal system of government, which met May 14th, 1787.

Early in the Convention, Alexander Hamilton suggested, practically, the treaty-clause which was afterward adopted: "That the Executive, with the advice and approbation of the Senate, have power to make all treaties, and that those treaties be a part of the supreme law of the land." Twice, in the Convention, it was proposed to add the House of Representatives, but Pennsylvania alone voted in the affirmative. An amendment was proposed by Mr. Morris, that no treaty should be binding till it was ratified by law, and this was also lost. During the last discussion of the clause, Mr. Wilson moved again to add the words, "House of Representatives," and this was also lost.

All of this is indisputable evidence, clearly showing that the subject was carefully discussed and fully understood, and that the almost unanimous voice of the Convention, of the framers of our Constitution, was that the treaty-making power should be vested in the President and its ratification rest with the Senate.

Before its final adoption, the Constitution was carefully, sometimes violently, discussed and debated in State conventions, every State taking up the treaty clause, Virginia most hotly of all, and finally suggesting the amendment that: "No commercial treaty shall be ratified without the concurrence of two-thirds of the whole number of the Senate." If the able men of Virginia who discussed this treaty-clause, as founders of the Constitution, had so construed it that, before a commercial treaty could become binding, an act of Congress would be necessary to establish it, they would not have sought to introduce an amendment providing that "no commercial treaty shall be ratified without the concurrence of two-thirds of the *whole* number of the Senate."

The first and in many respects most noteworthy attempt to restrict this power occurred in the House in 1796, seven years after the adoption of the Constitution. The House was called upon for an appropriation of $80,000 in carrying out the terms of the so-called "Jay treaty," between England and the United States. The treaty was intensely unpopular in the United States, a fact which influenced the action. It was in every sense a commercial treaty. Not until it was ratified and proclaimed did President Washington send a copy to the House "for its information," in connection with the appropriation. The House was in a majority against the Administration. It was an opportunity not to be lost. A resolution was offered, requesting President Washington to furnish the House with all correspondence in the matter, that it might judge of the wisdom of passing the appropriation. The right of the House to consider any question connected with a treaty, against its imperative duty to appropriate money so required, was vigorously fought, for a month—a long time, considering the fact that at the time there were only 96 members. They were reminded that in March, 1794, a law went into effect laying an embargo on all vessels, when the Executive construed an earlier treaty with Sweden as exempting the vessels of that nation, and they were suffered to depart, although Congress had prohibited it; that several treaties had been concluded with Indian tribes, embracing all of the points which were now subject of contest—settlement of boundaries, money grants—ratified by the Senate and proclaimed, without reference to the House, but that the House had considered them laws and made the necessary appropriations without discussion. The majority prevailed, and the resolution passed. President Washington refused to present the required correspondence, saying, in his message:

"Having been a member of the general convention, and knowing the principles on which the Constitution was formed, I have ever entertained but one opinion on the subject, and from the first establishment of the Government to this moment my conduct has exemplified that opinion, that the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur, and that every treaty so made and promulgated thenceforward becomes the law of the land."

This opinion of President Washington was not based wholly upon his own convictions, nor was he alone responsible for the

action. He received written opinions from every member of his Cabinet. Among them was Oliver Ellsworth, afterward Chief Justice of the Supreme Court. Chief-Justice Ellsworth's letter, written March 13, 1796, I believe, has never before been published. It is, in part, as follows:

"The grant of the treaty-making power is in these words: 'The President, with the advice and consent of the Senate, shall make treaties.' The power goes to all kinds of treaties, because no exception is expressed; and also because no treaty-making power is elsewhere granted to others, and it is not to be supposed that the Constitution has omitted to vest sufficient power to make all kinds of treaties which have usually been made, or which the existence or interests of the nation may require.

"The effect of treaties is declared in these words: 'All treaties made under the authority of the United States shall be the supreme law of the land.' The Constitution gives them their effect, and they do not, therefore, need or derive it from Congressional resolutions or statutes. The instant the President and Senate have made a treaty, the Constitution makes it the law of the land; and, of course, all persons and bodies, in whatever station or department, within the jurisdiction of the United States, are bound to conform their actions and proceedings to it.

"Such treaty, *ipso facto*, repeals all existing laws so far as they interfere with it. This is an inseparable attribute of a statute or of what has the effect of one; but, on the other hand, a treaty cannot be repealed or annulled by statute, because it is a compact with a foreign Power, and one party to a compact cannot dissolve it without the consent of the other.

"The claim of the House of Representatives to participate in or control the treaty-making power is as unwarranted as it is dangerous. It has no support but from a usage of the British House of Commons, the reason of which does not apply here. The House of Representatives have no examination to make, nor does it appear that they have before them any legitimate object of inquiry to which the papers can apply. They have a right to impeach, or to originate a declaration of war, but neither of these objects is avowed by the House nor are they to be presumed."

A resolution of protest was passed, but the House also passed the necessary appropriation; so that the question was left unsettled on the first occasion when it was discussed, and the same arguments have been used many times, since then, down to the present day, with the same result, and it is doubtful if it is now any nearer a final settlement, at least so far as the contending opinions of Congress are concerned.

In 1803, the whole question was again discussed, when Congress

was called upon to make the appropriation for the purchase of Louisiana. Jefferson was then President. In 1790, he was of the opinion that a treaty of itself repealed a revenue law, as he stated, in a written opinion, on a treaty with the Creek Indians, which he submitted to Washington on July 29th:

"A treaty made by the President, with the concurrence of two-thirds of the Senate, is the law of the land, and a law of superior order, because it not only repeals past laws, but cannot itself be repealed by future ones. The treaty then will legally control the duty acts."

It will be noted that Jefferson's opinion touches the very question which has been so much discussed—whether a treaty, of itself, repeals a duty or revenue law.

Thus far the question had only been as to the duty of the House to pass the required appropriations; but, in 1816, the question came under consideration: Does an act of Congress become necessary to repeal a revenue or tariff law with which a treaty conflicts, or does the treaty, of its own force, repeal it? It cannot, I suppose, be questioned that treaties generally repeal laws with which they conflict; but do they repeal revenue and tariff laws?

The treaty regulating commerce and trade between the United States and Great Britain, signed by Adams, Clay and Gallatin, was necessitated by discriminating revenue laws which grew out of the war of 1812, and was in direct conflict with certain revenue acts of Congress. After it was ratified and proclaimed by President Madison, he laid the proclamation before Congress, stating: "I recommend such legislative provisions as the convention may call for, on the part of the United States."

Simply out of courtesy, the Senate passed a Declaratory Act, stating that: "So much of any act or acts as is contrary to the provisions of the convention shall be deemed and taken to be of no force or effect." But the House, in an effort to instigate the question of its rights, passed a bill of its own, in which the provisions of the treaty were substantially reenacted, in the shape of law. When this bill came before the Senate, Senator Barbour, of Virginia, made a strong protest, in which he said:

"Is the aid of the legislature necessary in all cases whatsoever to give effect to a commercial treaty? It is readily admitted that it is not; that a treaty whose influence is extra-territorial becomes obligatory the instant of its ratification; that, as the aid of the legislature

is not necessary to its execution, the legislature has no right to interpose. It is then admitted that while a general power on the subject of commerce is given to Congress, that yet important commercial regulations may be adopted by treaty, without the cooperation of the legislature, notwithstanding the generality of the grant of power on commercial subjects to Congress.

"If it be true that the President and Senate have, in their treaty-making power, an exclusive control over part and not over the whole, I demand to know at what point that exclusive control ceases. In the clause relied upon there is no limitation. The fact is, none exists. The treaty-making power over commerce is supreme. No legislative sanction is necessary, if the treaty be capable of self-execution; and when a legislative sanction is necessary, as I shall more at large hereafter show, such sanction when given adds nothing to the validity of the treaty, but enables the proper authority to execute it; and when the legislature does act in this regard, it is under such obligation as the necessity of fulfilling a moral contract imposes. Congress has power to lay embargoes, pass non-intercourse laws, or non-importation or countervailing laws, but the President and Senate have a right to repeal or modify them by treaty. If by treaty we agree, as in this case, that for an equivalent we will forbear to exact a higher tonnage duty on British than American ships, then the treaty, as it needs no legislative aid, is self-executory."

Senator Fromentin, an able lawyer and judge, who spoke upon the question, said:

"A treaty is a law; it is not to become a law when an act shall have been passed by Congress to make it so. Otherwise, it would have been useless to make treaties a part of the supreme law. The Constitution declares that from the moment a treaty has been ratified, by and with the consent and advice of the Senate, it is the supreme law. There can be no two definitions of law. Does not a treaty of peace repeal the act of Congress declaring war?"

Two of the greatest speeches ever made in Congress were delivered, on this occasion, by John C. Calhoun and William Pinkney, both in the House of Representatives, both claiming that the treaty itself, by its own force, repealed all laws in contravention with it.

These speeches are far too long to quote. Brief extracts cannot give the pith of them. Those interested in the subject should obtain and study the entire reasoning of these two men, upon a vital occasion when they turned their best talents to the question.

Only one clause of Mr. Calhoun's speech is here quoted, and that simply because it suggests a vital argument why the treaty-

making power must be vested in other hands than Congress. In defining a treaty as a contract between two parties, he said:

"It is no more or less than that Congress cannot make a contract with a foreign nation.

"Let us apply it to a treaty of commerce—to this very case. Can Congress do what this treaty has done? It has repealed *the discriminating duties* between this country and England. Either could by law repeal its own. But by law they could go no further, and for the same reason that peace cannot be made by law. Whenever, then, an ordinary subject of legislation can only be regulated by contract, it passes from the sphere of the ordinary powers of making laws and attaches itself to that of making treaties. The truth is the legislative and treaty-making powers are never in the strict sense concurrent. They both may have the same subject, as in this case commerce, but they discharge functions as different in relation to it in their nature as their subject is alike. It is proposed to establish some regulation of commerce. We immediately inquire, Does it depend on our will; can we make the desired regulation without the concurrence of any foreign power? If so, it belongs to Congress, and any one would feel it to be absurd to attempt to effect it by treaty.

"On the contrary, does it require the consent of a foreign power? *Is it proposed to grant a favor, to repeal discriminating duties on both sides?* It is equally felt to belong to the treaty power; and he would be thought insane who would propose to abolish the discriminating duties in any case by an act of the American Congress."

But another document exists which is not so easily accessible, as it has never been published. It is a letter written by J. C. Calhoun, when he was Secretary of State, in 1844, to Mr. Henry Wheaton, in whose hands was the negotiation of the treaty between the United States and the German Customs Union. The original letter is now in the State Department.

The treaty had been presented to the Senate, and by the Foreign Relations Committee its ratification was unfavorably reported, so close upon the adjournment of the Senate that discussion was impossible, and it was laid on the table. A few lines from Secretary Calhoun's letter will show that by the wider field and closer intimacy with the possibilities and necessities of the treaty-making power his previous opinions had only been strengthened. The letter states:

"I have examined the objections to the treaty with care, and must say they seem to me neither insuperable nor formidable. The two leading objections urged are: 'lack of constitutional competency' to make the

treaty and 'the unequal value of the stipulated equivalents.' The report relies mainly upon the former to support the conclusions. 'Upon this single ground' it advises that it be rejected. The report states that 'the control of trade and the function of taxing belong, without abridgment or participation, to Congress'; and concludes that the treaty is unconstitutional and ought to be rejected.

"With all due deference, I must think that the report greatly errs as to a part of its premises and wholly as to its conclusions."

After referring to past treaties the letter continues:

"There is an entire and numerous class—I refer to reciprocity treaties —which almost invariably contain changes in existing laws regulating commerce and navigation, and duties laid by law. So well is the practice settled that it is believed it has never before been questioned. The only question, it is believed, that was ever made was, whether an act of Congress was not necessary to sanction and carry the stipulations, making the change, into effect.

"It is true that the Constitution delegates to Congress the power of regulating commerce and laying duties. But does the delegation of a power to Congress exclude it from being the subject of the treaty-making power? If so, then all powers appertaining to our foreign relations are excluded from the treaty power.

"The treaty-making power has been regarded to be so comprehensive as to embrace, with few exceptions, all questions which can possibly arise between us and other nations, and which can only be adjusted by mutual consent."

William Pinkney, the great statesman, lawyer and diplomat of the day, who made the other notable address, with Mr. Calhoun, was a member of the conventions ratifying constitutions, and was equally earnest in insisting that the treaty of commerce is self-executing. Aside from its lucid opinions, however, there is a paragraph bordering on prophecy, which suggests the reason, not only of the continual renewal of this question in Congress, but why the public at large should be thoroughly informed in this vital matter, and be able to render intelligent judgment, without relying upon some, possibly prejudiced, mentor. Mr. Pinkney said:

"By what process of reasoning will you be able to extract from the wide field of that general provision, giving the President and Senate power over treaties, the obnoxious case of a commercial treaty, without forcing along with it the case of a treaty of peace, and along with that again the case of every possible treaty?

"Nay, the whole treaty-making power will be blotted from the Con-

stitution, and a new one, alien to its theory and practice, be made to supplant it, if sanction and scope be given to the principles of this bill. The bill may indeed be considered as the first of many assaults, not now considered as assaults perhaps, but not therefore the less likely to happen, by which the treaty-making power, as created and lodged by the Constitution, will be pushed from its place and compelled to abide with the power of ordinary legislation. The example of this bill is beyond its ostensible limits.

"The pernicious principle, of which it is at once the child and apostle, must work onward and to the right and left until it has exhausted itself, and it never can exhaust itself until it has gathered into the vortex of the legislative powers by Congress the whole treaty-making capacity of the Government."

The suggested possibility has thus far proven true, and the matter is still under discussion, with no new features; and still as far from final settlement, apparently, as ever. Mr. Pinkney's fear that it might become a matter of *policy* seems not to have been without foundation. In many more modern instances than these that have been referred to, the ground has been gone over and over. Masses of the ablest opinions have been collecting, but all to no purpose. Volumes of later quotations might be made, in line with those already given; meanwhile, we have been continuously negotiating treaties, through the Executive, ratified by the Senate, which have, therefore, been sustained as the supreme law of the land.

The Constitution gives to Congress powers over specific subjects; but that has never prevented the treaty-making power from regulating the same subjects by convention. Congress is given power to establish a uniform rule of naturalization, for example; yet, in our treaty acquiring Louisiana, it was expressly stated that the residents of the territory should become citizens of the United States. Congress is given power to make rules for the government of the army and navy, but the Hague Convention stipulated rules which would govern our armies in case of war.

It is claimed that reciprocity treaties, unlike other treaties, do not become fully effective without Congress, because the Constitution provides that bills for raising revenue shall originate in the House; but there is less reason for saying that a reciprocity treaty is unconstitutional because of that provision, than that a commercial treaty is unconstitutional because of the commerce clause. The provision was not intended as a limit to the treaty-

making power. It was Justice Story's opinion that the term "revenue bill" implies those bills which levy taxes, in the strict sense of the word, and not bills for other purposes which may incidentally deal with revenue. As a matter of fact, the legislative and treaty-making powers are absolutely separate and distinct. Whenever there is to be an agreement between two independent nations, there the treaty power must make the laws that shall govern; and the very fact that they are to govern two nations renders it obviously necessary that they must be supreme and immutable. It is true that the Supreme Court has held that an act of Congress may repeal a treaty; but such a repeal would only be effective so far as our own domestic law is concerned. The other nation would still have a right to consider us bound, by our contract; and, if the contract was broken on our part, it might lead to a declaration of war. The two powers do not conflict. The whole controversy is an effort to crowd another element, a very large and divided element, to-day—the House of Representatives—into the treaty-making power, with the result which Pinkney so pointedly suggested. It requires no extended vision to see the complications and delays which would result, increasing the already hampered conditions of international intercourse and contact, and the absurdities to which it would lead.

The powers are distinct. The framers of the Constitution intended that they should be distinct. They must remain distinct. A reciprocity treaty is as much a part of the supreme law of the land as any other treaty, and, if it contains no provision for Congressional action, of its own force it repeals a revenue or tariff law the moment it is made by the President and ratified by the Senate.

The recent claim that the "favored nation clause" in our treaties precludes us from making reciprocity conventions, has already been determined by the Supreme Court, in its statement that other nations cannot ever claim the same concessions as are given by means of reciprocity, as they are obviously an exchange of valuable considerations.

The strongest argument and authority which have been used against the validity of reciprocity treaties appeared in a speech which the late Senator Morrill made, in the Senate, when the Mexican treaty was pending for ratification. He is reported in the "Record" as saying, on the authority of Senator Hoar, that

Daniel Webster said: "I hope I know the history of my country better than to think a reciprocity treaty is constitutional."

Since that time, this has often been referred to; and it has been made the most of, in many ways. It may possibly be the case; but, without expressing a personal opinion, I can say that I have made a most thorough examination without being able to find any such statement, or indication of where it was made. In a speech in Baltimore, in 1845, Daniel Webster declared his opinion that the principle of reciprocity was wrong; but he did not say that a reciprocity treaty was unconstitutional. There is also a letter of instruction which Webster wrote to our Minister in England, in reference to the proposed Oregon boundary treaty, in which he said: "Any attempt to regulate duties by treaties must be well considered, before it is entered upon." Such a statement does not indicate that Webster considered reciprocity treaties unconstitutional.

Retracing the steps, it is difficult, I think, for any one who is unprejudiced to understand how our treaties can be considered unconstitutional or can require Congressional action before becoming effective. The treaty-making power must rest where the Constitution so plainly vests it, in the President, with and by the advice and consent of the Senate; and, for the best interests of the country and the facility of international intercourse, I hope it may always remain so.

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